



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. NO.202 OF 2016
IN THE MATTER OF THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF ARBITRATION BETWEEN

FLAMBERT HOLDINGS LIMITED.....CLAIMANT

AND

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

PATTERSON MUNENE KAMAARA.....ARBITRATOR

RULING

1. This Ruling concerns the Final Arbitral Award of Patterson Munene Kamaara dated 17th March 2016.
2. The Chamber Summons of 18th April 2016 seeks to have the Award recognized as binding and adopted as a Judgement of this Court. The other is the antithesis. It is the Chamber summons of 13th June 2014 seeking to set aside the said Award.
3. Although coming later, it makes sense to consider the setting aside Award first because its determination decides the fate of the Application for Recognition.
4. The setting aside Award is premised on three broad Grounds which the Court shall consider separately. But first a short background.
5. On 26th January 2012, Flambert Holdings Limited (**the Claimant**) entered into a Contract with Kenyatta National Hospital Board (**the Respondent**). The Contract was intituted "Equipment Placement Contract". In it was an Arbitration clause requiring that any dispute that arose between the contracting parties was to be referred to Arbitration.
6. A dispute arose and on 9th April 2015, Mr. Patterson Munene Kamaara was appointed to be an Arbitrator in the matter. On 17th march 2016, the Arbitrator awarded the Claimant a sum of

Kshs.26,500,100/= together with interest at 12% from 14th April 2015 to the date of the Award.

7. The Respondent is unhappy with the Award and argues, first, that the Arbitrator was biased and prejudiced against it. One complaint by the Respondent is that the Arbitrator conducted himself in breach of Section 19 of the Arbitration Act 1995 with regard to equal treatment of the Parties by awarding the Claimant on the basis of assumption while requiring the Respondent to strictly and absolutely prove its Counterclaim.

8. I have read the entire Award as is expected of me and I am afraid I am unable to reach the same conclusion as the Respondent. One breach of Contract that had been alleged by the Claimant was that it supplied and delivered reagents and diagnostic products which the Respondent refused to receive. For that breach the Claimant was awarded Kshs.7,733,675.20/=. This Court has seen the analysis of evidence by the Arbitrator which is found in paragraphs 22,23 and 24 of the Award. The Arbitrator gave reasons as to why he believed the side of the Claimant. For instance, he held,

“From the Claimant’s letters, especially the letter dated 29th December 2014 and the one dated 20th January 2015, it is clear that the Claimant intended to deliver the goods in December 2014 but delivery was refused by the Respondent. Even in early January, the Claimant still intended to deliver the products but it seems the Respondent held the view that the contract period would expire on 26th January 2015 and therefore the Claimant’s legal rights to deliver the contract had terminated by effluxion of time”.

9. The Arbitrator found that there was an LPO raised, and refusal by the Respondent to receive the goods on 26th December 2014 and 29th December 2014. The Arbitrator made reference to documentary evidence including LPOs and a self incriminating Report of 2nd February 2015 by the Respondents. In respect to the Report the Arbitrator held,

“A report dated 2nd February 2015 written by Dr. Gachii records that one of the reasons why KNH refused to accept more reagents from the Claimant in December 2014 was that **“The contract expired in January and accepting reagents in December simply extends the contract by default to March/April (Quarter order)”** This evidence offered by the Respondent gives credence to the Claimant’s assertion that the Respondent actually refused to accept delivery in December 2014.”

The evidence was well analyzed and no bias can be discerned at all.

10. On the Counterclaim, the Arbitrator found that the Respondent had failed to prove breach of Contract and any losses or damages flowing from the alleged breach. On the former the Arbitrator held that the Respondent had not produced any documentary proof like correspondence, letter or emails. For instance the Arbitrator specifically found that some of the Correspondence were in respect to the commencement dated which this Court shall be considering shortly. In respect to a letter of 20th January 2015 to the Claimant making reference to partially and un-serviced LPOs, this Court wonders whether this was not answered by the Arbitrator in the following observation,

“Yet I find that there has been on correspondent, letters or emails by the Respondent complaining about delays in 2014. What we find are LPOs extended without complaints to 29th December 2014”. (*my emphasis*)

11. Counsel for the Respondent submitted that certain documents produced by it were not properly considered by the Arbitrator. These are annexed to the Supplementary Affidavit of Calvin Nyachoti sworn on 11th October 2016. Of relevance to the Counterclaim would be the Respondent’s letters of 5th September 2014, 5th January 2015, 6th January 2015 and 20th January 2015. The Respondent has submitted that the following finding by the Arbitrator is a farce,

“there had been no correspondence, letter or emails complaining about delays in 2014”

While the Arbitrator’s finding may not be entirely correct in that there were complaints of delays he nevertheless dealt with the 2014 issues. In paragraph 24 of the Decision he states,

“... perhaps the Respondent was referring to the expiry of the Order for Supplies under the LPOs issued in October whose expiry dated had been extended to 29th December 2014”

The finding by the Arbitrator was that the LPOs had been extended without complaints to 29th December 2014. Even if this finding was wrong it has not been demonstrated that it was motivated by bias as it was arrived at by an analysis of the evidence by the Arbitrator and his own understanding of the facts. The same can be said about the finding of the commencement date to which I now turn to.

12. It is stated, on behalf of the Respondent, that the Arbitrator conjured and invented a term of Contract not contemplated by the parties. In reaching the decision that the commencement date was 30th August 2012, the Arbitrator had observed,

“Reading the contract as a whole so as to establish the intention of the parties, I note that though dated 26th January, 2012, it was intended that the contract would have a commencement date, other than the date of signing or the date on the first page thereof. Clause 1.1 c (GCC) states that the commencement date shall mean the date from which this contract shall be in force. Which was this date? The fact that clause 2.2., page 5 sets out a commencement date demonstrates that the draftsman of the contract, and the parties thereto, contemplated or anticipated that the contract would have a commencement date different from the date of the contract. If parties intended that commencement date be the date of the contract, there would have been no need to be-labour the date at clauses 1.1 c and 2.2 of the GCC. Again if the intention was to make 26th January 2012 as the commencement date nothing would have been easier than to state so categorically, even in correspondence prior to and subsequent to the signing of the agreement”.

13. The criticism on the Arbitrator may not be fair. He never invented or conjured up a date, he never rewrote the contract. All he did was to give efficacy to the Contract by establishing the intention of the parties.

14. The parties herein chose to resolve their dispute by way of Arbitration. Neither of them reserved a right to question the Arbitral findings on Appeal under Section 39 of the Act. What the Respondent has done is to invite this Court to sit an Appeal over the Arbitrators findings on issues which are camouflaged as a bias question. The concept of finality of Arbitration Award requires that the Court acknowledges that Arbitrators are masters of the facts and some deference is to be made to their findings. It cannot be that an alleged misapprehension of the evidence by an Arbitration can be construed as evidence of bias without more.

15. Were there internal inconsistency and incoherence in the Award? The Respondent had raised the following grounds under this heading:-

a. The Arbitrator awarded nothing to the Applicant/Respondent yet he had acknowledged that the Applicant/Respondent had suffered loss as a result of the Claimant/Respondent’s breaches.

b. The Claimant was awarded for defective goods supplied.

c. The Arbitrator awarded the Claimant on presumption of profit and without requiring proof of audited accounts demonstrating the Claimant’s alleged profit.

16. In the written submissions by the Respondents Counsel, he makes no submissions on these grounds. I

would agree with Counsel for the Claimant that the Arbitrator found that the Respondent had not suffered any loss and could not therefore be deserving an Award. On the issue of supply of Defective goods, there was no finding by the Arbitrator that the Respondent had supplied defective goods.

17. Yet to be fair to the Respondent the Award of Kshs.15,407,004.30 being the balance of the contractual sum for the last and final year of the contract may be difficult to support. That Award is based on an unproved assumption that the entire sum would comprise of profit. Hardly possible. The Arbitrator may have not taken all factors into account in assessing those Damages. However, this would be an error on an issue of Law that would be appealable under Section 39 of The Act. But for now my opinion may not matter as I cannot substitute it for that of the Arbitrator as I am determining a Setting aside Application under Section 35 of The Act.

18. Let me turn to the Respondent's arguments that the Award is contrary to the Public Policy of Kenya. In the body of the Application the Respondent asserts that the Award is contrary to the Public Policy of Kenya against unjust enrichment by awarding for goods not supplied and for supply of Defective goods. In addition, that the award is contrary to Article 201 (e) of The Constitution of Kenya on prudent and responsible use of Public funds by making a gratuitous award.

19. In Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR the Court of Appeal authoritatively said as follows about Public Policy,

“.....although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised”.

20. The Arbitrator found that the Respondent was liable for ;

- Goods delivered and invoiced and not paid for..... Kshs.33,359,320/=.
- Goods delivered and not received..... Kshs. 7,733,675.70.
- For the balance of contract sum not ordered ...Kshs.15,407,004.30/=.

21. The Arbitrator considered and analyzed the evidence that was before him and was entitled to make a finding that the Claimant had established a Claim under the three headings. On the quantum this Court may have come to a different decision on the last limb yet as this is not an Appeal it cannot substitute its view for that of Arbitrator. However, there is nothing in the Award that suggests that the Claimant was awarded for goods not supplied or for defective goods or that it was gratis. Although there may be some error on the quantum of damages, the Award does not involve an element of illegality as submitted by the Respondent. While it may be true that the principles of Public Policy are ever evolving they cannot be so elastic as to cover every occasion a party to an arbitration believes that the Arbitrator reached a wrong decision in law.

22. The Application of 13th June 2014 is without merit and is dismissed with costs. This paves the way for allowing the Chamber Summons of 18th April 2016. It is hereby allowed as prayed with Costs to the Claimant.

Dated, Signed and Delivered in Court at Nairobi this 15th day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Githinji holding brief Musyoki for Claimant

Lubullelah holding brief Mutubwa for Respondent

Alex - Court clerk